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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

HENRY KISSINGER, *et al.*,

Petitioners,

v.

MORTON HALPERIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF

BERTRAM ZWEIBON, MARILYN BETMAN, IRVING CALDERON, STUART C. COHEN, SHELDON DAVIS, JEROME EISENBERG, LAWRENCE H. FINE, EILEEN GARFINKLE, RUTH HARTSTEIN, LIBBY KAHANE, MEIR KAHANE, NEIL S. ROTHENBERG, MURRAY SCHNEIDER, ELI SCHWARTZ and ALEX STERNBERG,

***AMICI CURIAE*, IN SUPPORT OF RESPONDENTS**

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SUMMARY OF ARGUMENT

The case before the Court was argued and decided below with *Zweibon v. Mitchell*, 606 F.2d 1172 (D.C.Cir. 1979). Petitions for writs of certiorari in *Zweibon*, Nos. 79-881, 79-883, are being held pending a decision in this case. The plaintiffs in *Zweibon* are filing this brief

because this Court's decision in *Halperin* may encompass two issues which are of singular importance to the resolution of *Zweibon.*

A principal question before the Court in *Halperin* is whether the decision of the Court of Appeals for the District of Columbia Circuit in *Zweibon v. Mitchell,* 516 F.2d 594 (D.C.Cir. 1975) (en banc), *cert. denied,* 425 U.S. 944 (1976) ("*Zweibon I*"), is to be given retroactive or prospective effect. Whatever the Court may decide concerning the retroactivity of that decision to other cases, we urge the Court to make clear that the individuals whose litigation produced that decision are entitled to benefit from it.

Another major issue before the Court in *Halperin* is whether the President and his immediate subordinates are entitled to absolute immunity or "qualified immunity as a matter of law." Whatever this Court may decide with respect to that issue, a cabinet officer who is not acting at the specific direction of the President should be entitled only to the qualified immunity defense of *Butz v. Economou*, 438 U.S. 478 (1978), and *Scheuer v. Rhodes*, 416 U.S. 232 (1974), under which he must establish both (1) that he actually believed his conduct to be lawful, and (2) that such a belief was reasonable.

INTEREST OF THE AMICI

This brief is submitted on behalf of individuals whose communications were overheard when they used the telephones at the offices of the Jewish Defense League during the month of October 1970 and between January 5 and July 3, 1971. John Mitchell, then Attorney General, personally directed the installation and operation of the warrantless wiretaps upon requests from the Director of the Federal Bureau of Investigation citing the

Jewish Defense League's record of public demonstration and violence against Soviet and Arab diplomats. Mr. Mitchell has never suggested that the then President knew of or authorized the wiretaps.

In 1972, after the wiretaps were disclosed, these individuals sued, alleging violations of the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"). The district court granted defendants'[1] motion for summary judgment on the ground that the wiretaps were "national security" surveillances which could lawfully be installed without a warrant. *Zweibon v. Mitchell*, 363 F.Supp. 936 (D.D.C. 1973). In a lengthy opinion, the court of appeals, which sat *en banc*, reversed. *Zweibon I*, 516 F.2d 594 (D.C.Cir. 1975).

On remand, plaintiffs' demand for a jury trial on the defendant's good faith defense was struck by the district court. Upon plaintiffs' petition for a writ of mandamus, the court of appeals remanded the case on the "assumption" that the district court would grant a jury trial. *In re Zweibon*, 565 F.2d 742 (D.C.Cir. 1977) ("*Zweibon II*"). Thereafter, the district court again granted summary judgment for the defendant, refusing to apply retroactively the constitutional requirement that a warrant be secured for these kinds of national security wiretaps—the rule established in *Zweibon I*. The district court also limited to prospective effect *Zweibon I's* holding that the procedures and remedies of Title III apply to national security surveillances which violate the Fourth Amend-

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[1] The original complaint named as defendants the FBI agents who participated in the wiretaps. The FBI agents have since been dropped as defendants.

ment. *Zweibon v. Mitchell*, 444 F.Supp. 1296 (D.D.C. 1978).

The court of appeals reversed, holding that the constitutional warrant requirement was not to be "restrict[ed] . . . to prospective effect in damage suits like this one." *Zweibon v. Mitchell*, 606 F.2d 1172, 1175 (D.C.Cir. 1979) ("*Zweibon III*"). It affirmed, however, the district court's ruling that the statutory remedy established by *Zweibon I* would only be available prospectively, concluding that that question had been one of first impression in *Zweibon I*. 606 F.2d at 1181-82.

For eight years, the plaintiffs in *Zweibon, amici* here, have been seeking compensation for the violation of their rights in 1970 and 1971. The manner in which the Court decides the issues before it in *Halperin* will determine, in large part, whether they can proceed to the merits or whether the important legal issues remaining in the case will have to be resolved in *Zweibon IV, Zweibon V* and *Zweibon VI.*[2]

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[2] *Amici* have been represented by Nathan Lewin, Martin D. Minsker and Jamie S. Gorelick, who have participated in the preparation of this brief. They are members of a law firm which also represents former President Richard Nixon in connection with civil litigation and other matters unrelated to the electronic surveillances at issue in *Halperin*. While the issues before the Court in *Halperin* affect interests of the former President in these other matters (and have been discussed, in that context, by other attorneys in the firm with attorneys for the Department of Justice), the arguments presented in this *amicus* brief do not relate to, and would not affect, those interests.

I

THE PARTY WHOSE ACTION ESTABLISHES A RULE IS ENTITLED TO ITS BENEFIT, EVEN IF IT IS OTHERWISE GIVEN ONLY PROSPECTIVE EFFECT

In *Halperin*, the government urges this Court to give the decision in *United States v. United States District Court*, 407 U.S. 297 (1972) ("*Keith*") and the Court of Appeals' decision in *Zweibon I* only prospective effect. Whatever position this Court may take with respect to the application of *Zweibon I* to the plaintiffs in *Halperin*, it should make clear that the original litigants in *Zweibon I*—who arduously sought and won a landmark decision—are entitled to secure a meaningful judgment in that litigation.[3]

That result would be in accordance with the well-established rules applied by this Court. Thus, for example, although this Court gave only prospective effect to the principles announced in *United States v. Wade*, 388 U.S. 218 (1967), *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *Mapp v. Ohio*, 367 U.S. 643 (1961), the prevailing party in each of those cases received the benefit of the new rule he established. The approach which the Court has taken is illustrated by its statement in *Desist v. United States*, 394 U.S. 244, 254-55 n.24 (1969), in which it refused to apply *Katz v. United States*, 389 U.S. 347 (1967), retroactively: "Of course, Katz himself benefited from the new principle . . . and . . . to that extent the decision has not techni-

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[3] The Court of Appeals in *Zweibon III* gave retroactive effect to its decision in *Zweibon I* regarding plaintiffs' Fourth Amendment claims but gave only prospective effect to its decision regarding plaintiffs' statutory claims. See p. 4, *supra*.

cally been given wholly prospective application." *See also Daniel v. Louisiana*, 420 U.S. 31 (1975), and *Taylor v. Louisiana*, 419 U.S. 522 (1975) (rule in *Taylor* applied prospectively except as to litigant in that case); *United States v. Peltier*, 422 U.S. 531 (1975), and *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (rule in *Almeida-Sanchez* applied prospectively except as to litigant in that case).

Similarly, in *Simpson v. Union Oil Co.*, 396 U.S. 13 (1969), this Court gave the plaintiffs the benefit of a new rule of antitrust liability that was otherwise given only prospective effect. Earlier, in announcing the new rule which imposed antitrust liability on participants in consignment agreements, the Court had reserved the question whether the equities might warrant prospective application of the rule. *Simpson v. Union Oil Co.*, 377 U.S. 13, 24-25 (1964). On remand, the district court applied the rule purely prospectively, denying all damages. *Simpson v. Union Oil Co.*, 270 F.Supp. 754 (N.D.Cal. 1967). The Court of Appeals affirmed. *Simpson v. Union Oil Co.*, 411 F.2d 897 (9th Cir. 1969). The Supreme Court reversed, stating that it would be "most unusual" to deny relief to the party whose litigation established the new rule. The Court made clear that its earlier reservation of the retroactivity question was not intended "to deny the fruits of successful litigation to this petitioner." *Simpson v. Union Oil Co.*, 396 U.S. at 14.

This principle has been followed in a long line of cases in which a newly announced rule is applied to the litigant in that case even if it is otherwise given only prospective effect. *See, e.g., Plumley v. Hale*, 594 P.2d 497 (Alaska 1979); *Mendes v. Johnson*, 389 A.2d 781 (D.C. 1978) (en banc); *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d

1226, 119 Cal. Rptr. 858 (1975) (en banc); *Balts v. Balts*, 273 Minn. 419, 142 N.W.2d 66 (1966); *Kojis v. Doctors Hospital*, 12 Wisc. 2d 367, 107 N.W.2d 292 (1961); *Parker v. Port Huron Hospital*, 361 Mich. 1, 105 N.W.2d 1 (1960); *Molitor v. Kaneland Community Unit District No. 302*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959), *cert. denied*, 362 U.S. 968 (1960).

There are strong policy reasons for such an exception to prospective application of a new rule. Without it, there would be no incentive to litigate cases that may change the law. *See* Schaefer, *The Control of "Sunbursts": Techniques of Prospective Overruling*, 42 N.Y.U.L. Rev. 631, 638 (1967) (hereinafter "Schaefer").[4] As the court noted in *Molitor v. Kaneland Community Unit District No. 302*, 18 Ill. 2d at 28, 163 N.E.2d at 97 (1959):

> [T]o refuse to apply the new rule here would deprive appellant of any benefit from his effort and expense in challenging the old rule which we now declare erroneous. Thus there would be no incentive to appeal the upholding of precedent since appellant could not in any event benefit from a reversal invalidating it.

Accord, Plumley v. Hale, 594 P.2d at 505; *Mendes v. Johnson*, 389 A.2d at 791; *Li v. Yellow Cab Co.*, 13 Cal. 3d at 830, 532 P.2d at 1244, 119 Cal. Rptr. at 876; *Myers v. Drozda*, 180 Neb. 183, 141 N.W.2d 852 (1966). *See also* Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 Yale L.J. 907, 945 n.192 (1962) (hereinafter "Prospective Overruling").

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[4] Schaefer observes that if "the litigant whose efforts brought about the change in judicial doctrine receives no reward, other individual litigants would not be encouraged to attempt to reform the law through judicial decisions." Schaefer, 42 N.Y.U.L. Rev. at 638.

An exception for the litigant who brings the precedential case is particularly important in the civil context, where one party is seeking compensation for harm done to him by another. In fact, it has always been assumed in tort law that if a new legal theory of civil liability is upheld, the plaintiff is entitled to collect compensatory damages from the defendant. *See, e.g., Ford Motor Co. v. Mathis,* 322 F.2d 267 (5th Cir. 1963); *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 67, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905); *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

Indeed, the rationale for limiting a new legal doctrine to prospective application is far less persuasive in a civil case, where compensation for actual harm suffered is the subject of the dispute, than in the criminal context, where the sole purpose of the new doctrine is prophylactic—*i.e.*, to deter unconstitutional or unlawful investigative or prosecutorial conduct. This is all the more true for individuals whose lawsuits establish the new legal doctrine. There is little basis in reason or policy to deny to them the compensation for harm actually suffered which other victims will, as a result of their litigation, be able to recover against the same or similarly situated defendants if the same conduct is repeated.[5]

Moreover, the good-faith immunity defense provides more than ample protection to defendants in such suits. If a defendant can establish that he believed his conduct

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[5] Individual litigants, such as the plaintiffs in *Zweibon*, are to be distinguished, in this regard, from institutional litigants who will benefit in the future from a change in policy effected by their litigation. *Plumley v. Hale*, 594 P.2d at 505; *Mendes v. Johnson*, 389 A.2d at 791.

to be lawful and that such a belief was reasonable, the plaintiff will go uncompensated for his actual harm, even if he establishes a new valid legal doctrine. Thus, in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), recovery was not barred because new law was announced; rather, on remand to the Court of Appeals for the Second Circuit, recovery was made subject to the good-faith defense. *Bivens v. Six Unknown Named Agents*, 456 F.2d 1339 (2d Cir. 1972).

To be sure, an exception for the litigant who establishes the new rule creates an inequality between him and others who are similarly situated. But one "who successfully challenges existing legal doctrine can be, and has been, regarded as having thereby set himself apart." Schaefer, 42 N.Y.U.L. Rev. at 638.[6] Thus, in a leading case, *Stovall v. Denno*, 388 U.S. 293, 301 (1967), this Court explained (footnote omitted):

> Inequity arguably results from according the benefits of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue. But we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making.

The "sound principles of decision-making" to which this Court referred have their source in the case-or-controversy requirement of Article III of the Constitution.

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[6]Schaefer notes that permitting recovery to the particular litigant even if the decision is otherwise given only prospective effect, "has appealed to many state courts as a permissible way to limit the extent to which reliance is frustrated without making the court's determination an academic exercise; the Supreme Court of the United States has also used this technique." 42 N.Y.U.L. Rev. at 639 (footnote omitted).

Granting relief to the litigant who establishes the new rule is, as the Court noted, "an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum." *Id.*[7] *Accord, Simpson v. Union Oil Co.*, 396 U.S. at 14.

II

A SUBORDINATE OF THE PRESIDENT WHO ACTS NEITHER AT THE PRESIDENT'S DIRECTION NOR IN CONCERT WITH HIM IS IMMUNE FROM LIABILITY ONLY UPON A SHOWING OF AN ACTUAL AND REASONABLE BELIEF IN THE LEGALITY OF HIS ACTIONS

The government urges this Court to find that the President is specially and absolutely immune from civil liability. Whatever the Court may do in response to that argument, we urge the Court to follow *Butz v. Economou*, 438 U.S. 478 (1978), and hold that an Attorney General, who, in a particular instance, acts neither in specific concert with nor at the explicit direction of the President, may avoid liability only upon a showing of an actual and reasonable belief in the lawfulness of his actions.

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[7] The author of the note on *Prospective Overruling*, 71 Yale L.J. at 933, observed:

> [A] state court, after fashioning a new rule, may apply it: (1) to conduct occurring subsequent to the announcement only; (2) to conduct occurring subsequent to the announcement and also to the present litigants; or (3) to conduct occurring subsequent to the announcement, to the present litigants, and also to conduct which occurred prior to the announcement. For a federal court, however, the choice is more limited: Article III forecloses selection of the first alternative . . . .

The government does not argue in *Halperin* that cabinet officers are entitled to absolute immunity because of their own "special functions," preferring to rely upon the "close nexus" between presidential directions and individual conduct in that case. Brief for Petitioners at 50 n.44. In fact, petitioners' lengthy attempt to distinguish the President from his subordinates (*id.* at 25-44) belies any suggestion that his subordinates could also be entitled to absolute immunity based on their own "special functions" (*id.* at 50 n.44). Thus, for example, petitioners point out that only the President is elected; the electoral veto provides a check on his conduct unavailable with respect to his subordinates. This distinction undermines any argument that his subordinates also should be absolutely immune.

Similarly, the petitioners argue that the President has historically been immune from civil liability. Brief for Petitioners at 11, 20-26. There is no such history with respect to cabinet officers. In *Butz v. Economou*, the Secretary of Agriculture was a defendant. This Court did not suggest that he could escape liability merely on the basis of his position alone. *See also Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979), *modified on other grounds*, 100 S.Ct. 1987 (1980); *Forsyth v. Kleindienst*, 599 F.2d 1203 (3d Cir. 1979); *Apton v. Wilson*, 506 F.2d 83 (D.C.Cir. 1974); *State Marine Lines, Inc. v. Schultz*, 498 F.2d 1146 (4th Cir. 1974).

The petitioners' principal argument—that the President's uniquely broad span of activity and responsibility make it unfair to impose liability for the effect of his decisions—similarly undercuts the notion that cabinet officers should be absolutely immune from liability. If it is true, as the government asserts, that "the easier or less

controversial matters are disposed of at a lower level" leaving the "difficult choices among reasonable alternatives" for the President (Brief for Petitioners at 26), there is concomitantly less reason to immunize the decisions made at a lower level.

Similarly, to the extent that the petitioners' argument for absolute presidential immunity rests on the President's unique position within our government, it supports the conclusion that absolute immunity should not be extended to the President's subordinates. The petitioners quote extensively, for example, from II D. Watson, *The Constitution of the United States*, 1023-24, 1025-26 (1910) (Brief for Petitioners at 27-28 n.24), which points out the ways in which the responsibilities and burdens of the executive branch—as compared to the legislative and judicial branches—rest in one man alone. Thus, while the "legislative branch is composed of many members" and the "judicial branch is a collective body"—and it would be difficult "to injure either numerically so as to interfere with the administration of the Government"—that is not true for the executive branch, where "[o]ne man constitutes all there is of that . . . . Thus, the petitioners' authority concludes, "it is only because the President is clothed with so extraordinary a power that he can be said to be exempt from the operations of the law." The obverse is that the President's subordinates have no such claim to absolute immunity.

The petitioners concede that their arguments for absolute presidential immunity rest on the uniqueness of the President's position. They state (Brief for Petitioners at 41-42; emphasis added):

> [T]he President does occupy *a position far different from those held by his subordinates* . . . . As the highest elected official in the Nation and the *only*

> *constitutional officer* in the Executive Branch, the Chief Executive possesses *powers and responsibilities that are unparalleled* in the government .... The complexity, importance, and controversial nature of the issues that come to the President's attention; the commitment of the *full executive power to a single individual*. . . ; his unique status as the only official in the Executive Branch who is chosen by . . . the electorate . . . *distinguish the Office of the President.*

Thus, none of the arguments marshalled by petitioners for conferring absolute immunity on the President supports such a conclusion with respect to his subordinates. In fact, to the extent that petitioners' position rests upon the uniqueness of the presidency, the broad span of the President's control, or his special elective post, it undercuts any claim of absolute immunity for cabinet officers.

The only argument advanced by petitioners in support of granting presidential subordinates absolute immunity is based upon the fact that they may act with or at the explicit direction of the President. Where, as in *Zweibon*, however, the subordinate acts in his own domain, independently of the President, he can make no such claim to derivative immunity. There is no cloak of advice and consultation arguably provided by Article II, Section 2, of the Constitution. And there is no protection for independent conduct of the sort which might result from following the orders of the Commander-in-Chief.

A decision granting a cabinet officer absolute immunity would seriously undermine the holding of *Butz v. Economou*, 438 U.S. 478 (1978), that federal officials generally have only qualified immunity. If the Attorney General, for example, is entitled to absolute immunity because of his "special functions," he would escape

liability in every meritorious *Bivens* suit, but his subordinates would not. Such a result would be intolerable. As this Court stated in *Butz* (438 U.S. at 505-06):

> It makes little sense to hold that a Government agent is liable for warrantless and forcible entry into a citizen's house in pursuit of evidence, but that an official of higher rank who actually orders such a burglary is immune simply because of his greater authority.

If high government officials have absolute immunity, a suit for redress of constitutional torts would provide neither compensation to the injured nor deterrence of future wrongs (438 U.S. at 506):

> [T]he greater power of such officials affords a greater potential for a regime of lawless conduct. Extensive Government operations offer opportunities for unconstitutional action on a massive scale. In situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees.

The Court in *Butz* was not unmindful of the weighty responsibilities of high government officials, but found that those responsibilities are more properly considered in the context of the officials' good-faith defense. It quoted with approval *Apton v. Wilson*, 506 F.2d at 93 (438 U.S. at 501 n.28):

> Having a wider territorial responsibility than the head of a state government, a Federal cabinet officer may be entitled to consult fewer sources and expend less effort inquiring into the circumstances of a localized problem. But these considerations go to the showing an officer vested with a qualified immunity must make in support of a 'good faith belief;' they do not make the qualified immunity itself inappropriate. The head of an executive

> department, no less than the chief executive of a state, is adequately protected by a qualified immunity.

The facts in *Zweibon* demonstrate the wisdom of *Butz*, *Apton* and the two-part immunity defense of *Scheuer v. Rhodes*, 416 U.S. 232 (1974). In March 1969, this Court remanded a number of cases in which the United States had disclosed that federal agents had conducted warrantless electronic surveillances in which criminal defendants had been overheard. *Alderman v. United States*, 394 U.S. 165 (1969); *Giordano v. United States*, 394 U.S. 310 (1969); *Taglianetti v. United States*, 394 U.S. 316 (1969). Mr. Justice Stewart, concurring in *Giordano*, noted that the Court had not addressed itself to the gathering of "foreign intelligence information" which he defined as "necessary for the conduct of international affairs, and for the protection of national defense secrets and installations from foreign espionage and sabotage." 394 U.S. at 314. This definition was taken *verbatim* from the United States' petition for rehearing in *Ivanov v. United States*, 394 U.S. 165, *rehearing denied*, 394 U.S. 939 (1969).

Within ten days, memoranda were sent to then Attorney General Mitchell by J. Walter Yeagley, Assistant Attorney General in the Internal Security division (now a member of the District of Columbia Court of Appeals) and then Solicitor General Erwin Griswold. Mr. Yeagley's memorandum expressed his view that under the Supreme Court's ruling (p. 3a, *infra.*; App. 489):[8]

> [T]he best installations to defend, from the standpoint of legality, are those which are aimed at

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[8] "App." refers to the Joint Appendix on Appeal in *Zweibon III.*

> gathering foreign intelligence information or information necessary for the protection of national defense secrets and installations from foreign espionage and sabotage.

Mr. Yeagley argued that the Department of Justice should only contend that an electronic surveillance installed on the Attorney General's authority is lawful if it satisfied any of the five objectives specified in 18 U.S.C. § 2511(3), which had been enacted in 1968. He acknowledged that these were "the standards that guide the Attorney General today and which we will be defending in the future" (p. 4a, *infra.*; App. 490).

Assistant Attorney General Yeagley recognized that "some installations probably could not be justified even under the statutory criteria," including those on "domestic organizations with no clear foreign attachment which would pose difficult First and Fourth Amendment problems." (p. 5a, *infra.;* App. 490).

Solicitor General Griswold's advice was even more restrictive. Noting that it would be desirable to litigate and obtain judicial rulings on the legality of "national security" surveillances, the then Solicitor General said that it was therefore important for the Department of Justice to "decide on the precise situations in which we wish to contend that the President has power to authorize electronic surveillance to protect the national security." Mr. Griswold then gave his legal judgment (p. 8a, *infra.*; App. 498-99; emphasis added):

> It could be argued that such power extends to the protection of the national security from internal subversion and, thus, the Attorney General could, without court order, constitutionally authorize electronic surveillance of the [deleted] or other subversive organizations or any officers or members of

> such organization. *I believe, however, that any attempt to sustain such surveillances would be disastrous. Not only would we not prevail on the particular facts presented* but I believe we would get a broad ruling that all electronic surveillance is unconstitutional if conducted without a warrant.

In a subsequent memorandum, Mr. Griswold said (p. 15a, *infra.*; App. 508; emphasis added):

> Thus, I think our chances of success are much greater if we limit our submission that the Attorney General can constitutionally authorize electronic surveillance to those instances where the surveillance is designed to gather foreign intelligence information. *In fact, I think that we should limit our attempt to sustain the legality of such surveillance to instances involving the surveillance of a foreign establishment.*

The memorandum concluded with Mr. Griswold's observation that "[i] f a domestic organization is engaged in a criminal conspiracy, we can obtain a warrant to authorize eavesdropping under the Crime Control Act, but there is no procedure under the Act to get a warrant to eavesdrop for foreign intelligence purposes" (p. 16a, *infra.*; App. 509).

Assistant Attorney General Wilson also submitted a memorandum of little more than one page, in which he asserted that "wiretaps involving the dangerous and violent internal subversion" should be defended as legal. No detailed legal reasoning was provided (p. 19a, *infra.*; App. 510). There is no indication that Mr. Mitchell received advice from anyone else.

Rejecting strong advice from his Solicitor General to the contrary, the Attorney General authorized warrantless wiretaps on a domestic group unaffiliated with a

foreign government. In so doing, he was not "conform-[ing] . . . to the prevailing statutory or constitutional norm." *United States v. Peltier*, 422 U.S. 531, 542 (1975). Rather, he was taking a chance deliberately, on "notice that a constitutional right was at risk." *Owen v. City of Independence, Missouri*, 100 S.Ct. 1398, 1425 (1980) (Powell, J., dissenting). Such conduct should not be shielded from liability merely because he was a cabinet officer.[9]

The petitioners in *Halperin* argue, alternatively, that they are entitled to qualified immunity "as a matter of law." Brief for Petitioners at 50-62. By this they mean that, in the absence of an "authoritative declaration" of the law (*see id.* at 51-52), no liability can attach even if the official did not, in fact, believe that his conduct was lawful or if he had no reasonable basis for believing that his conduct was lawful. Such a standard would permit an official who has been advised that a proposed course of conduct is unlawful to avoid liability merely by showing that the Supreme Court had not yet spoken directly to the issue. That is not the standard established by this Court in *Scheuer v. Rhodes*, 416 U.S. at 247-48, and

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[9] Under *Butz v. Economou*, the Attorney General may be entitled to absolute immunity when he decides "whether a particular prosecution shall be instituted . . . ." 438 U.S. at 510, quoting *Yaselli v. Goff*, 12 F.2d 396, 404 (2d Cir. 1926), *aff'd*, 275 U.S. 503 (1927). Prosecutorial immunity does not, however, extend to investigate decisions such as whether to institute or carry out searches. *Bivens v. Six Unknown Named FBI Agents*, 403 U.D. 388 (1971); *Forsyth v. Kleindienst*, 599 F.2d 1203, 1214 (3d Cir. 1979): *Apton v. Wilson*, 506 F.2d 83, 94 (D.C.Cir. 1974); *Guerro v. Mulhearn*, 498 F.2d 1249, 1256 (1st Cir. 1974); *Hampton v. City of Chicago*, 484 F.2d 602, 608 (7th Cir. 1973); *cert. denied*, 415 U.S. 917 (1974).

applied to federal officials in *Butz v. Economou*, 438 U.S. at 497-98 (emphasis added):

> It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, *coupled with good-faith belief*, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

The record in *Zweibon* provides ample evidence of the danger and unfairness inherent in affording more than this—absolute immunity or "qualified immunity as a matter of law"—to federal officials.

CONCLUSION

We have submitted this brief to emphasize the points that are critical to our litigation, which the Court has held in abeyance pending the result in *Kissinger v. Halperin*, No. 79-880. Whatever may be the particular outcome of that case, this Court should either deny the petition for a writ of certiorari in *Zweibon v. Mitchell*,

No. 79-881, or, if it issues a writ of certiorari, (1) affirm the judgment below to the extent that it remands the case to the district court for trial, and (2) reinstate plaintiffs' claims under Title III.

Respectfully submitted,

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APPENDIX A

The Attorney General — April 1, 1969

J. Walter Yeagley
Assistant Attorney General
Internal Security Division

Hearings on Remand of Cases Involving
Electronic Interceptions

This memorandum will first be forwarded to the Solicitor General and Mr. Will Wilson for consent.

As a result of the several opinions of the Supreme Court on March 24, 1969, a number of Criminal Division and Internal Security Division cases have been remanded to the district courts for further hearings in connection with electronic eavesdropping.

The central issue in each of these hearings will be the question of the legality or illegality of certain specific electronic eavesdropping installations most of which were at various times and for varying reasons personally authorized by the Attorney General under Presidential delegation.

In the government's petition for rehearing in the espionage case involving *Igor Ivanov*, the Solicitor General limited the request to that portion of the decision of the Court concerning disclosure of "electronic surveillance relating to the gathering of foreign intelligence information, which term we use to include the gathering of information necessary for the conduct of international affairs, and for the protection of national defense secrets and installations from foreign espionage and sabotage."

Deputy AG	Mr. Yeagley	Courtesy
AAG, Criminal	Mr. Maroney	
Sol. General	Mr. Davitt	

In Justice Stewart's concurring opinion in *Giordano v. United States*, he made it perfectly clear that the Supreme Court was not then deciding whether the electronic surveillances in question violated the Fourth Amendment, but that this was being left as a "threshold question for the District Court to decide." He also said that the Supreme Court has "nowhere indicated that this determination cannot appropriately be made in *ex parte, in camera* proceedings."

Justice Stewart went on to say that the Court has not addressed itself "to the standards governing the constitutionality of electronic surveillance relating to the gathering of foreign intelligence information necessary for the conduct of international affairs, and for the protection of national defense secrets and installations from foreign espionage and sabotage."

The forthcoming hearings on remand will involve disclosures relating to electronic eavesdropping on - - -

the organized crime area were subsequently ratified by Attorney General Katzenbach. We do not believe that the illegality of these installations should be conceded although we should avoid testing their legality if at all possible at the present time by turning over the surveillance logs.

This would apply to three installations in the *Ivanov* case assuming the Bureau and State Department approve. They have previously approved *in camera* inspection. It seems clear that the best installations to defend, from the standpoint of legality, are those which are aimed at gathering foreign intelligence information or information necessary for the protection of national defense secrets and instaliations from foreign espionage and sabotage. However, the Internal Security Division believes if we limit our criteria to those areas, we are too narrowly confined. For example, a tap placed on - - - - - - - - - - - - - - - - - - [deletion] - - - - - - - - or a para-military organization or any other organization that seeks the violent overthrow of the government probably could not be sustained although - - - - - - - - [deletion] - - - - - - - - - - - - - - foreign attachment would offer an added argument in that instance.

Title 3 of the Omnibus Crime Control and Safe Streets Act of 1968, recognizes a broader authority in the President, acting through the Attorney General, to approve electronic surveillances. Section 2511 provides:

> "(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power to obtain foreign intelligence informa-

> tion deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary, to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. . .

This is obviously a codification by the Congress of its view of the standards which would justify this important exception to the prohibitions against electronic eavesdropping.

Thus, we should contend that an electronic surveillance which was installed on the specific authorization of the Attorney General is a lawful installation as the Attorney General's authorization was premised on information which led him to the reasonable belief that such installation was necessary (1) "to protect the Nation against actual or potential attack or other hostile acts of a foreign power." (2) "to obtain foreign intelligence information deemed essential to the security of the United States," (3) "to protect national security information against foreign intelligence activities," (4) "to protect the United States against the overthrow of the government by force or other unlawful means," or (5) "to protect the Nation against any other clear and present danger to the structure or existence of the government." The latter criterion, of course, must be read in a context of protecting the structure or existence of the government from change by force and violence. The foregoing are, in fact, the standards that guide the Attorney General today and which we will be defending in the future. They have been at least implicitly sanc-

tioned by Congress. The Criminal Division and Internal Security Division believe we should adopt them for purposes of presentation of the legal issues in these limited hearings.

It should be noted, however, that some installations probably could not be justified even under the statutory criteria. This would not only include organized crime taps and mikes, but also some internal security installations such as those on - - - - - - - - - - - - [deletion] - and domestic organizations with no clear foreign attachment which would pose difficult First and Fourth Amendment problems. The illegality of these installations need not be conceded but all interceptions of a defendant and all such interceptions from the premises of a defendant must be turned over to the defendant or the case must be dismissed.

After the approval of a general policy as above, each case involving a security installation must be resolved on an ad hoc basis. Those involving organized crime installations present a choice of disclosure or dismissal.

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APPENDIX B

The Attorney General

April 3, 1969

JSM:gsm

The Solicitor General

The purpose of this memorandum is to consider what action should be taken by the Department of Justice in light of the Supreme Court's decision in *Alderman v. United States*, No. 133, O.T. 1967, decided March 10, 1969, and *Giordano v. United States*, No. 28, this Term, decided March 24, 1969, and *Taglianetti v. United States*, No. 446, this Term, decided March 24, 1969. This question has two parts (1) what action should the government take in those cases presently pending in which we have disclosed the fact that the defendant has been overheard during the course of an electronic surveillance and (2) what action should we take now and in the future with regard to the disclosure of the fact that defendant or his premises were subject to electronic serveillance. With regard to each of these issues, I shall endeavor to set forth some of the possible alternative courses of action and then indicate the course that I think appropriate.

1. *Cases in which some disclosure has already been made.*

[deletion]

A. *Cases where we do not contend that the surveillance was lawful.*

[deletion]

B. *Alternative to disclosure where the surveillance was illegal.*

[deletion]

C. *Procedure where we claim that the disclosed surveillance was legal.*

The opinion of the court in *Alderman*, as clarified in *Giordano* and *Taglianetti*, provides that the district court must determine whether the surveillance at issue was lawful. The Court specifically noted in *Giordano* that "a finding by the district court that the surveillance was lawful would make disclosure and further proceedings unnecessary." Thus, in those cases where the surveillance was authorized by the Attorney General in the interest of national security, we can contend in the district court that the surveillance was legal (see *Katz v. United States*, 389 U.S. 347, 362-364 (White, J. concurring)) and that the defendant is not entitled to any disclosure.

The Court's opinion in *Taglianetti* makes clear that *Alderman* does not require "an adversary proceeding and full disclosure for resolution of every issue raised by an electronic surveillance," and Justice Stewart's concurring opinion in *Giordano* strongly suggests that the question of the legality of a surveillance may be determined on the basis of an *in camera* presentation of the facts to the district judge. Thus, if we were able to establish that the surveillance was legal on an *in camera* presentation of the facts to the district judge, we would not have to make any damaging disclosure to the defendant.

We must consider, however, whether we want to press the courts to decide whether the President acting through the Attorney General has the constitutional power to authorize wiretapping and eavesdropping without a warrant in order to protect the national security. As matters stand now we can always defend such actions on the ground that it is lawful. If, however, the courts decide the issue against us, the President will be faced with the choice of discontinuing all such surveillances or continu-

ing to authorize action which the courts have declared unconstitutional. If we do not litigate the issue of legality, we could justify a policy of not disclosing such surveillances to a defendant in future cases on the ground that we believe that only illegal surveillances should be disclosed. Thus, we *might* be able to avoid this problem in future cases.

I am persuaded, however, that we should litigate the question of the legality of such surveillances in the present cases. I do not believe the problem will go away. Even if we change our voluntary disclosure policy, defense counsel can still make motions to require us to disclose whether or not the defendant was overheard during *any* electronic surveillance. If such a motion were made, I think that the Court would not let us hide behind a claim that it was our opinion that any surveillance that did occur was legal. Therefore, I believe that we may as well litigate the question of the legality of national security surveillances in the pending cases.

If we determine to litigate this question, we must decide on the precise situations in which we wish to contend that the President has power to authorize electronic surveillance to protect the national security. It could be argued that such power extends to the protection of the national security from internal subversion and, thus, the Attorney General could, without court order, constitutionally authorize electronic surveillance of the - - - [deletion] - - - - or other subversive organizations or any officers or members of such organization. I believe, however, that any attempt to sustain such surveillances would be disastrous. Not only would we not prevail on the particular facts presented but I believe we would get a broad ruling that all electronic surveillance is unconstitutional if conducted without a warrant.

In our petition for rehearing in *Ivanov* we limited our submission that the Attorney General could constitutionally authorize electronic surveillance to those situations where the purpose of the surveillance was to gather information necessary for the conduct of international affairs and for the protection of national defense secrets and installations from foreign espionage or sabotage. I would similarly limit our submission to the district courts on remand. Not only is such an approach more likely to be successful, but our need to isolate the surveillances from disclosure is the strongest in this area. Although the disclosure of the wiretapping or bugging of a domestic subversive organization might be embarrassing, we could not possibly disclose the location of our foreign intelligence surveillances. Moreover, to the extent that there is evidence that a domestic organization is engaged in serious criminal activity we could get a warrant under the Crime Control Act, but the Act does not provide the machinery for a warrant for a foreign intelligence surveillance. Thus, I strongly urge that we claim legality only for those surveillances expressly authorized by the Attorney General to gather foreign intelligence information and to protect national defense installations and secrets from foreign espionage and sabotage.

If we do seek to sustain the legality of such surveillances in the district courts, I strongly urge that these cases be uniformly handled and carefully presented. As we noted in our brief in *Ivanov*, in attempting to litigate such a question a problem arises because we cannot reveal to the defendant all of the facts concerning the surveillance. Thus, there is a problem of providing a procedure that will meet the standards of "due process" but yet withholds from the defense that information which cannot be disclosed. I would suggest that we adopt the following procedure:

An affidavit of the Attorney General should be filed with the district court and a copy given to defense counsel. The affidavit would state (1) that the defendant was overheard in the course of a surveillance which was not directed at him but was being conducted solely to gather foreign intelligence information, and give the approximate date of the overhearing; (2) that records of the Department of Justice establish that the surveillance was instituted at the express personal direction of the Attorney General and that a copy of the authorization is being submitted to the court for its in camera examination; (3) that it would prejudice the national interest to disclose any additional facts concerning the surveillance to the defendant; and (4) that a copy of the record of the surveillance, together with the relevant facts as to time and place, is being submitted to the court for its *in camera* examination so that the court can satisfy itself that the purpose of the surveillance was to gather foreign intelligence information.

I believe that this procedure will give the defense an adequate factual basis on which to argue the legal question concerning the Attorney General's constitutional power to authorize such a surveillance while protecting the government's interest in nondisclosure.

2. *Possible chances in disclosure policy in future cases.*

[deletion]

APPENDIX C

CONFIDENTIAL

April 7, 1969

MEMORANDUM FOR THE ATTORNEY GENERAL

RE: Hearings on remand of cases involving electronic interceptions

On April 3, 1969, I sent you a memorandum in which I undertook to summarize the results of the decisions of the Supreme Court in this field, including the recent decisions of the Court in *Ivanov v. United States, Giordano v. United States,* and *Taglianetti v. United States.* In addition, I undertook to raise and discuss some of the polity questions which remain in this area.

At about the time my memorandum was completed, I received a copy of the memorandum which Assistant Attorney General J. Walter Yeagley addressed to you on April 1, discussing the policy to be followed in cases of this sort in the future.

This memorandum is addressed to the suggestions contained in Mr. Yeagley's memorandum. I find myself in disagreement with some of his proposals regarding the instances in which we should contend that electronic surveillance authorized by the Attorney General is legal. Accordingly, I am writing this memorandum to set forth my views, with specific reference to Mr. Yeagley's suggestions. I am sending copies of this memorandum to Mr. Yeagley, Mr. Wilson, and to the Deputy Attorney General.

As I noted in my earlier memorandum to you, in our petition for rehearing in *Ivanov*, we limited our submission that the Attorney General could constitutionally

authorize electronic surveillance without a warrant to those instances where the purpose of the surveillance was to gather information necessary for the conduct of international affairs and for the protection of national defense installations and secrets from foreign espionage and sabotage.

Mr. Yeagley would have us broaden our claim of legality to embrace two other purposes: (1) "to protect the United States against the overthrow of the government by force or other unlawful means," and (2) "to protect the Nation against any other clear and present danger to the structure or existence of the government."

While it is true that in the Crime Control Act Congress indicated that the President acting through the Attorney General might have the power to authorize electronic surveillance for these purposes, I do not think the courts, particularly the Supreme Court, would systain [sic] such a power. Moreover, if we attempt to sustain the power of the Attorney General to authorize electronic surveillance for purely domestic purposes, we will, in my view, prejudice our efforts to sustain the legality of electronic surveillance directed at the activities of foreign powers. Thus, as a matter of litigation strategy, it is my opinion it would be unwise for us to seek to sustain the validity of electronic surveillance directed at the - - - - [deletion] - - - or other domestic individuals or organizations.

The Supreme Court has for the past several years, and with virtual unanimity, manifested great hostility to laws attempting to limit the rights of Communists and others suspected of engaging in subversive activities. During the last four years, we have lost every internal security case we have had in the Supreme Court. See *Albertson v. Subversive Activities Control Board*, 382 U.S. 70; *Gojack v. United States*, 384 U.S. 702; *Dennis v. United States*,

384 U.S. 855; *United States v. Lamb,* 385 U.S. 475; *Travis v. United States*, 385 U.S. 491; *United States v. Robel*, 389 U.S. 258; *Schneider v. Smith*, 390 U.S. 17. See also, *Brown v. United States*, 381 U.S. 437. It is significant that the Government not only lost these seven cases, but all of them were without dissent, except for two dissenting votes in one case, and two partial dissents in another. Thus, the Government was able to muster only four votes out of close to sixty in these seven cases.

While many of these cases were decided on narrow grounds, the fact that the Supreme Court ruled so firmly against us in all of them clearly supports the conclusion that the Court views with suspicion laws aimed at those suspected of subversive activities. Indeed, in *Robel* and *Schneider*, the Court struck down programs designed to preclude Communists from employment in defense facilities and in the merchant marine. The reasoning of the court in *Robel* is most significant. The Court said (389 U.S. at 264):

> "the Government asserts that [the statute making it a crime for a Communist to be employed in a defense facility] is an expression 'of the growing concern shown by the executive and legislative branches of government over the risks of internal subversion in plants on which the national defense depend[s].' Yet this concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideas which set this Nation apart. For almost two centuries our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed

> be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile.

I find little reason to doubt that the Court would react similarly if we attempted to argue that it is necessary, without a warrant, to eavesdrop on the conversations of Communists or others suspected of subversive activities in order to protect the "national security." This would be particularly true now, since under section 251 of the Crime Control Act, we can get an eavesdrop warrant if we have probable cause to believe that the eavesdrop may provide evidence of treason, espionage, sabotage or crimes relating to riots.

While it is never possible to predict with 100% accuracy what the Supreme Court will do in a future case, my thought is that Justice Stewart's concurring opinion in *Giordano* can well serve as a guide in our future actions. After pointing out that the question of legality was still open for decision in the district court, Justice Stewart noted:

> "The Court has not in any of these cases addressed itself to the standards governing the constitutionality of electronic surveillance relating to the gathering of foreign intelligence information necessary for the conduct of international affairs, and for the protection of national defense secrets and installations from foreign espionage and sabotage.

Under all the circumstances, it seems to me unlikely that Justice Stewart would have written this concurrence unless he felt that a majority of the Court would uphold such conduct. It is significant, too, that he adopted the precise notion of "foreign intelligence" which we had suggested in *Ivanov* rather than the broad concept of

"national security" referred to in the concurring opinion of Justice White in *Katz v. United States*, 389 U.S. 347, 362-364.

In this regard, reference may also be made to the concurring opinion of Justice Douglas, joined by Justice Brennan, in *Katz*, 389 U.S. at 359-360. This rejects the idea that the President acting through the Attorney General can authorize eavesdropping in "national security" cases, and is based in large part on the idea that, since the President and Attorney General "may even be the intended victim of subversive action," they would not be as neutral as a magistrate. That reasoning would not apply, however, to surveillances designed to gather "foreign intelligence information."

Thus, I think our chances of success are much greater if we limit our submission that the Attorney General can constitutionally authorize electronic surveillance to those instances where the surveillance is designed to gather foreign intelligence information. In fact, I think that we should limit our attempt to sustain the legality of such surveillance to instances involving the surveillance of a foreign establishment.

I agree with Mr. Yeagley that there is no reason for us to concede that only foreign intelligence surveillances may be constitutionally authorized by the Attorney General. My point is, rather, that we should, for the present, at least, litigate the legality issue only in cases involving foreign intelligence surveillances conducted at foreign establishments.

In our original briefs in *Alderman* and *Ivanov* we tried to protect from unnecessary disclosure any electronic surveillances conducted by the government. The result of this effort to protect ourselves on all fronts was the opinion of the Court in *Alderman* which, until the

clarification in *Giordano* and *Taglianetti*, could be construed as requiring us to disclose all surveillances. With the benefit of hindsight, it might have been better had we originally limited our submission in *Alderman* to the question of "standing," and in *Ivanov* to the position we ended up with in the petition for rehearing in *Ivanov*.

Fortunately, Justice Stewart's concurring opinion in *Giordano* gives us some hope that we may yet prevail with regard to foreign intelligence surveillances. Nevertheless, we are now faced with a last ditch fight to protect our right not to disclose the facts concerning foreign intelligence operations. In this situation, it is not wise, in my view, for us to try at this time to win for ourselves the greatest possible protection. Rather, we should decide what ground we have a chance to hold, and then make every effort to secure approval of th t [sic] position.

Obviously, it is highly desirable that we not be placed in a position where we are forced to disclose foreign intelligence surveillances. It is not as necessary that we preclude disclosure of surveillances directed at domestic subversive activities. This is for two reasons: (1) the embarrassment attendant upon disclosure of domestic surveillances is not comparable to that which would result if we were forced to disclose foreign intelligence surveillances; (2) If a domestic organization is engaged in a criminal conspiracy, we can obtain a warrant to authorize eavesdropping under the Crime Control Act, but there is no procedure under the Act to get a warrant to eavesdrop for foreign intelligence purposes.

Thus, my recommendation is that we litigate the question of the Attorney General's power to authorize electronic surveillance only in those cases where the surveillance was conducted at a foreign establishment in order to gather foreign intelligence information or to

protect defense secrets and installations from foreign espionage and sabotage.

Erwin N. Griswold
Solicitor General

CC: Deputy Attorney General
Mr. Yeagley—Internal Security
Mr. Wilson—Criminal
Mr. Martin—SG's staff

APPENDIX D

The Attorney General

April 15, 1969
t. 4-8-69

Will Wilson
Assistant Attorney General
Criminal Division

Electronic Surveillance

Assistant Attorney General J. Walter Yeagley has forwarded to me for comment his April 1, 1969 memorandum to you concerning the standards to be applied in determining which non-judicially authorized national security surveillances to contend were constitutional.

I agree that:

1. Our claims of constitutionality should not be limited to the types of surveillances described in our Petition for Rehearing in the *Ivanov* case, since no provision was made for any wiretaps involving the dangerous and violent internal subversion.

2. Our claims of constitutionality should at least go so far as to reach the types of electronic surveillances described in the 1968 Federal eavesdropping statute which recognizes the President's power "to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government."

3. In determining which surveillances to claim were constitutional, we should not lock ourselves into any promises in the courts to confine our constitutionality

contentions only to certain types of security surveillances. Each surveillance should be determined on a case by case basis.

I do not agree that we could not successfully urge the constitutionality of certain security microphones (installed by trespass) which were approved by the FBI Director under a general delegation of authority from the Attorney General. I do feel, however, that this issue need not be decided now, but can await the appropriate case, i.e., where the device cannot be revealed and the prosecution cannot be abandoned.
